

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,

)

)

Appellant,

)

)

Vs.

)

Case No. SC 92786

)

EDWIN CAREY,

)

)

Respondent.

)

Appeal from Greene County Circuit Court
Thirty-First Judicial Circuit
The Honorable Calvin R. Holden, Judge

RESPONDENT'S BRIEF

S. Dean Price
Attorney at Law
Missouri Bar Number 34514

1125 N. Boonville
Springfield, Missouri 65802
(417) 865-2181
FAX (417) 865-2261
Thinkbig@sbcglobal.net

INDEX

| | |
|-----------------------------|----|
| TABLE OF AUTHORITIES | 3 |
| JURISDICTIONAL STATEMENT | 5 |
| STATEMENT OF FACTS | 6 |
| RESPONSE TO POINT RELIED ON | 8 |
| ARGUMENT | 9 |
| CONCLUSION | 18 |
| CERTIFICATE OF SERVICE | 19 |

TABLE OF AUTHORITIES

| | <u>Page</u> |
|---|--------------------------------|
| <u>CASES:</u> | |
| <i>City of Springfield v. Clouse</i> , 356 Mo. 1239, 206 S.W. 2d 539 (1947) | 11 |
| <i>Doe v. Phillips</i> , 194 S. W. 3d 833 (Mo. banc 2006) | 17 |
| <i>Ex Parte Betherum</i> , 66 Mo.545, 1877 WL 8778 | |
| (Mo. 1877) | 6, 8, 12, 13, 14 |
| <i>F.R. v. St. Charles County Sherriff's Dept. /State v. Raynor</i> , | |
| 301 S.W.3d 56 (Mo. banc 2010) | 8, 9, 14, 16 |
| <i>Independence National Education Association v. Independence School</i> | |
| <i>District</i> , 223 S.W.3d 131 (Mo. banc 2007) | 8, 10, 12 |
| <i>R.L. v. Department of Corrections</i> , 245 S.W.3d 236 (Mo. banc 2008) | 13 |
| <i>State ex inf. Dalton v. Dearing</i> , 364 Mo. 475, 263 S.W.2d 381 (Mo. 1954) | 8, 10 |
| <i>State v. Justus</i> , 205 S.W. 3d 872 (Mo. banc 2006) | 9 |
| <i>State v. Kyle</i> , 65 S. W. 763 (Mo. 1901) | 13 |
| <i>StopAquila.org v. City of Peculiar</i> , 208 S.W. 3d 895 (Mo. banc 2006) | 10 |
| <u>CONSTITUTIONAL PROVISIONS:</u> | |
| Mo. Const., Art I, Sec. 13 | 5, 6, 8, 9, 10, 12, 13, 14, 17 |
| Mo. Const., Art I, Sec. 29 | 10, 11 |
| Mo. Const., Art. V, Sec. 3 | 5 |

STATUTES:

Section 566.150, RSMo

5, 6, 8, 9, 14, 15, 16, 17

JURISDICTIONAL STATEMENT

This appeal is from a judgment entered in the Circuit Court of Greene County dismissing a felony information that charged Respondent Edwin Carey with being a sex offender present within 500 feet of a public park in violation of section 566.150, RSMo Cum. Supp. 2009, on the basis that application of the statute to the Respondent violated the prohibition contained in article I, section 13 of the Missouri Constitution on the enactment of laws that are retrospective in their operation. This appeal involves the validity of a state statute, section 566.150, RSMo. Therefore, the Supreme Court of Missouri has exclusive appellate jurisdiction. Mo. Const. art. V. § 3 (as amended 1982).

STATEMENT OF FACTS

Edwin Carey was charged by information in Greene County Circuit Court on a single count of the class D felony of Loitering Within 500 Feet of a Public Park or Swimming Pool, section 566.150 RSMo (L.F. 1, 33). The information alleged that on or about July 3, 2010, Carey was convicted in June of 1997 of statutory rape in the second degree. Then Mr. Carey was present on real property comprising a public park which contained playground equipment. (L.F. 33).

Carey filed a “Motion to Dismiss Felony Information and Declare Section 566.150 Unconstitutional as it Applies to Defendant.” (L.F. 1, 37-38). The motion stated that section 566.150 RSMo was enacted in 2009, twelve years after his May 7, 1997, guilty plea to a registerable sex offense. (L.F.37). The motion further stated that article I, section 13 of Missouri’s Constitution prohibits the enactment of laws that are retrospective in their operation, which are laws that impose a new obligation, duty or disability on matters already legally and finally settled. (L.F. 37). The motion stated that laws similar to section 566.150 had been found unconstitutionally retrospective as applied to offenders convicted before the enactment of the law. (L.F. 37). The motion then stated that section 566.150 imposed a new obligation on him that was not present at the time of his conviction for the qualifying sex offense and was therefore retrospective as applied to him. (L.F. 38). The State filed a Response to Defendant’s Motion to Dismiss in which it argued that, based on this Court’s precedent in *Ex parte Bethurum*, 66 Mo. 545 (1877), the constitutional ban on retrospective laws is limited exclusively to civil rights and

remedies and has no application to crimes and punishment. (L.F. 1, 39-50).

A hearing was held on May 22, 2012, where both sides reiterated the arguments made in their respective filings. (L.F. 2; Tr. 2-14). The court granted Carey's motion and dismissed the information without prejudice on August 3, 2012. (L.F. 2). The State filed a Notice of Appeal in the Circuit Court on August 10, 2012. (L.F. 2, 51-53).

POINT RELIED ON

The Information filed against Edwin Carey was properly dismissed by the trial court because the statute under which Carey was charged, Section 566.150, RSMo., as applied to Carey violates the ban on retrospective laws contained in Article I, Section 13 of the Missouri Constitution. The trial court properly concluded that Article I, Section 13 applies to crimes and punishments as well as civil rights and remedies when considering the plain language of Article I, Section 13, and in that section 566.150, RSMo. created new obligations, duties, and attached new disabilities to Carey solely based on a past transaction, his 1997 conviction for a sex offense, the statute was unconstitutionally retrospective as applied to Carey.

Mo. Const., Art I, Sec. 13

State ex inf. Dalton v. Dearings, 364 Mo. 475, 263 S.W.2d 381 (Mo. 1954)

Independence National Education Association v. Independence School District, 223 S.W.3d 131 (Mo. banc 2007)

F. R. v. St. Charles County Sherriff's Dept., 301 S.W.3d 56 (Mo. banc 2010)

ARGUMENT

The Information filed against Edwin Carey was properly dismissed by the trial court because the statute under which Carey was charged, Section 566.150, RSMo., as applied to Carey violates the ban on retrospective laws contained in Article I, Section 13 of the Missouri Constitution. The trial court properly concluded that Article I, Section 13 applies to crimes and punishments as well as civil rights and remedies when considering the plain language of Article I, Section 13, and in that section 566.150, RSMo. created new obligations, duties, and attached new disabilities to Carey solely based on a past transaction, his 1997 conviction for a sex offense, the statute was unconstitutionally retrospective as applied to Carey.

Standard of Review

The Missouri Supreme Court reviews issues of law *de novo*. *State v. Justsus*, 205 S.W.3d 872, 878 (Mo. banc 2006). “A statute is presumed valid and will not be held unconstitutional unless it clearly contravenes a constitutional provision.” *F.R. v. St. Charles County Sheriff’s Department*, 301 S.W.3d 56, 61 (Mo. Banc 2010). The party asserting the invalidity of a statute bears the burden of proving that a statute is unconstitutional. *Id.*

The Plain Language of Article I, Section 13 Indicates

the Ban on Retrospective Laws Applies to Criminal Cases as well as Civil.

Essentially, the State, is arguing that this Court to ignore the plain meaning of

Article I, section 13 of the Missouri Constitution and speculate as to the intent of the drafters of the Missouri Constitution as well as the understanding of the voters who approved it.

This Court, however, has been clear that statutes and constitutional provisions should be interpreted using their plain, ordinary, common sense meaning. *State ex inf. Dalton v. Dearing*, 364 Mo. 475, 263 S.W.2d 381, 385 (Mo. 1954). Constitutional provisions are given even broader interpretations than statutory provisions “due to their more permanent character.” *StopAquila.org v. City of Peculiar*, 208 S.W. 3d 895, 899 (Mo. Banc 2006). “Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, or for the exercise of philosophical acuteness or judicial research. They are instruments of a practical nature, founded on the common business of life, adapted to common wants, designed for common use, and fitted for common meanings.” *Dearing* at 385.

This Missouri Constitution, Article I, Section 13 states “[t]hat no ex post facto law, nor law impairing the obligations of contracts, or retrospective in its operation or making any irrevocable grant of special privileges or immunities, can be enacted.” This Court, as recently as 2007, has addressed the issue of interpretation of a constitutional provision based on the plain language of the Missouri Constitution. In *Independence National Education Association v. Independence School District*, 223 S.W.3d 131 (Mo. Banc 2007), the issue before this Court was whether Article I, Section 29 of the Missouri

Constitution regarding the collective bargaining right of employees was limited to private-sector employees only. Article I, Section 29 provides that “employees shall have the right to organize and to bargain collectively through representatives of their own choosing.” In support of that Respondent’s position, Respondent cited *City of Springfield v. Clouse*, 356 Mo. 1239, 206 S.W.2d 539, 542 (1947) in which this Court had previously held that the right to collectively bargain as provided for in Article I, Section 29 did not apply to public employees.

This Court overruled *Clouse*, ultimately concluding that the plain language of the constitutional provision controlled and that there was no need for the Court to read words into the provision that did not appear. *Independence School District* at 137. Both parties cited the debates of the constitutional convention to support their positions as to what the delegates intended with regard to the inclusion or exclusion of public sector employees. *Id.* At 136-37. This Court noted that while the debates were interesting, they neither added nor subtracted from the plain meaning of the constitutional provision. *Id.* At 137. “Missouri’s voters did not vote on the words in the Constitution, which says “employees shall have the right to organize and bargain collectively...” *Id.* The Court also noted that Article III, Section 50 provides a vehicle for the voters to change the language of the constitution. *Id.*

The facts at issue in *Independence School District* and this Court’s holding therein are analogous to the case at bar as they related to the construction of constitutional

provisions. The State cites that Constitutional Debates of 1875 at length in support of its position that the drafters did not intend to include crimes and punishments in the protection against retrospective laws contained in Article I, Section 13. (Ap. Brief 20-31) The State also relies on *Ex Parte Betherum*, 66 Mo.545, 1877 WL 8778 (Mo. 1877), in support of its position that Article I, Section 13 applies only to civil rights and remedies and not to crimes and punishments. The *Betherum* case, decided just two years after the enactment of Article I, Section 13 specifically declared the ban on retrospective laws to civil rights and remedies despite no constitutional language limiting it so. *Id.* at 550.

This Court has specifically rejected the State's position of reliance on historical research to determine the meaning of a constitutional provision. This Court has also rejected the interpretation of a constitutional provision when Courts have applied a technical meaning versus the plain, ordinary language. *Betherum* is an incorrect precedent as it failed to follow this Court's standards for constitutional interpretation. Just as with the constitutional provision at issue in *Independence School District*, the voters in 1875 voted on the provision relating to retrospective laws as it read, in its plain and ordinary meaning. The voters did not approve a constitutional provision with language limiting its application to civil rights and remedies. There is no need or justification for this Court to inject additional language and meaning 137 years later.

**Case Law Subsequent to Betherum Does not Limit Article I, Section 13
To Civil Rights and Remedies Alone**

Respondent has found no case since *Betherum* which explicitly interprets the ban on retrospective laws to apply civil rights and remedies alone. However, there are numerous cases in which this Court has recognized that the protection against retrospective laws is indicated it has a much broader application and in which the Court has recognized that the prohibition against retrospective laws is broader than the prohibition against ex post facto laws.

In *State v. Kyle*, 65 S.W. 763 (Mo.1901), this Court discussed the distinction between ex post facto laws and retrospective laws. The Court noted that the ban on retrospective laws is broader than the protections against ex post facto laws. “Every ex post facto law must necessarily be retrospective, but every retrospective law is not an ex post facto law.” *Id.* at 768. The Court recognized that these are two separate principles and recognized that the concept of retrospective laws encompasses a broader range of laws than ex post facto laws.

In *R.L. v. Department of Corrections*, decided in 2008, this Court addresses a statute enacted after the conviction of a sex offender which limited the residency of the offender. 245 S.W.3d 236 (Mo. Banc 2008). The statute provided a criminal penalty for failing to meet the new obligations. *Id.* The Court held that the new obligations imposed on the offender by the statute violated the constitutional ban on retrospective laws as they were based solely on an offense committed before the enactment of the statute. *Id.* at 237-38. The Court did not limit the applicability of Article I, Section 13 to civil rights and

remedies alone.

The ruling in *F.R. v. St. Charles County Sherrieff's Dept./State v. Raynor*, 301 S.W.3d 56 (Mo. Banc 2010), removed all uncertainty by explicitly and unequivocally declaring the ban on retrospective laws of Article I, Section 13 of the Missouri Constitution applicable to criminal laws as well as civil laws. This Court stated: "A new criminal law operates retrospectively if it changes the legal effect of a past conviction." *Id.* at 63. "A subsequent law that requires a sex offender to do something-with a criminal penalty for not doing what the new law requires-is the imposition of a new obligation or duty imposed solely as a result of the pre-statute conviction." *Id.* at 62. The facts in the case at bar are nearly identical to those in the *R.L.* and *F.R./Raynor* cases. In any respect that the *F.R.* case is in conflict with the *Betherum* decision, the *Betherum* decision has effectively been overruled by the Missouri Supreme Court's holding in *F.R.* and is no longer applicable to crimes and punishments as well as to civil rights and remedies. Through its rulings in *R.L.* and the *F.R./Raynor* cases, this Court has clearly expressed its intent to apply the ban against retrospective laws to criminal as well as civil laws.

Section 566.150 RSMo. is a Retrospective Law

as Applied to Carey

It is undisputed, both in the trial court and in this Court, that Section 566.150, RSMo. was enacted and went into effect twelve years following Carey's qualifying conviction for a sex offense (L.F. 19-20, Ap. Brief 7-8, Tr. 2-3).

The statute clearly imposes a disability on Mr. Carey as a result of his previous conviction by preventing his presence in or near public parks or swimming pools. He can no longer visit and enjoy public parks or swimming pools, a right he has had for his lifetime and, most importantly, a right that he has continued to have for the past twelve years following his conviction until the passage of Section 566.150, RSMo. It is undisputed that Carey, and his wife, were on public park property looking for a cave. Though Carey's car was parked by the playground it is undisputed that there were no children present (TR. 5-13).

Section 566.150, RSMo provides that individuals convicted of certain sexual offenses "shall not knowingly be present in or loiter within five hundred feet of any real property comprising any public park with playground equipment or a public swimming pool." This statute places on the individual the obligation and duty of locating every public park and public swimming pool in any city, town, or location in which he resides. Further, it places on the individual the obligation and duty of locating every public park and public swimming pool in any city, town, or location he visits or passes through. It places on the individual the obligation and duty of locating every business, establishment, or other building or location within 500 feet of every public park and swimming pool in any city, town, or location in which he resides or visits. It effectively places on the individual the restriction of preventing residence within 500 feet of every public park and public swimming pool. The requirements under this statute are analogous to the

restrictions places on the petitioner in *F.R. v. St. Charles County Sheriff's Dept.*, which the Court found to be new duties and obligations rendering the statute's application unconstitutionally retrospective.

“The obligation or duty imposed on F.R. is that-before moving to a new residence-F.R. has to find out whether the residence is within 1,000 feet of a school or day-care facility. If, as it turns out, the new residence is within 1,000 feet of such a facility, he must move. There is in this case an obligation or a duty imposed years after F.R.'s conviction that he must perform or else he will be subject to a new criminal penalty under section 566.147.4.” *F.R.* at 63. The duties placed on Carey by Section 566.150, RSMo. are nearly identical, and arguably more burdensome than those faced by Appellant in *F.R.* Instead of a school, as in *F.R.*, Carey must stay away from public parks and swimming pools. Instead of the requirements that *F. R.* faced that he not reside within 1,000 feet of a school, Carey must stay from within 500 feet of all public parks and swimming pools. And although Section 566.150, RSMo does not state that the defendant is not allowed to “reside” within 500 feet of a public park or swimming pool, in effect, it prevents him from doing so by prohibiting him from “loitering” within 500 hundred feet of either.

Mr. Carey cannot, as the State argues, avoid criminal liability merely by refraining from the activities prohibited by the statute. It requires an affirmative duty for him to seek out and locate the restricted areas so he can avoid them and prevent violation of Section 566.150, RSMo, as Appellant was required to do in *F.R.* All of these obligations, duties

and disabilities are imposed solely because of Carey's 1997 conviction for a sex offense and not as a result of some later criminal conduct. These new obligations, duties and disabilities imposed by Section 566.150, RSMo are more than mere collateral consequences of his 1997 conviction. This statute imposed an entirely new criminal penalty, twelve years following his 1997 conviction, solely based on his status as a sex offender. Section 566.150, RSMo. gave "to something already done a different effect from that which it had transpired." *Doe v. Phillips*, 194 S.W.3d 833, 850 (Mo. Banc 2006). Section 566.150, RSMo., as applied to Carey, is a retrospective law which violates Article I, Section 13 of the Missouri Constitution.

CONCLUSION

For all the above and foregoing reasons presented, Respondent, Edwin Carey, respectfully requests that this Court affirm the trial court's dismissal of the Information charging Respondent with the Class D Felony offense of being present within 500 feet of a Public Park or Swimming Pool pursuant to Section 566.150, RSMo. (Cum. Supp. 2009).

Respectfully submitted,

/s/ S. Dean Price

S. Dean Price
Missouri Bar Number 34514
Attorney at Law

S. Dean Price
1125 N. Boonville
Springfield, Missouri 65802
(417) 865-2181
FAX (417) 865-2261

CERTIFICATE OF COMPLIANCE AND SERVICE

I, S. Dean Price, hereby certify to the following. The attached brief complied with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, In Times New Roman, size 13 point font and contains margins no smaller than one inch. The brief, exclusive of the cover page and certificate of compliance and service contains 3,227 words.

I, the undersigned, hereby certify that a true and complete copy of the foregoing was filed through the E-filing service on July 14, 2013, to:

DANIEL N. MCPHERSON
 Assistant Attorney General
 Missouri Bar No. 47182
 P.O. Box 899
 Jefferson City, MO 65102
 (573)751-3321
 (573) 751-5391 fax
dan.mcpherson@ago.mo.gov

/s/ S. Dean Price _____
 S. Dean Price
 Attorney at Law